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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-538

UNITED STATES OF AMERICA,

Petitioner,

v.

HENRY OGLE WATSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

OPINION BELOW 1

QUESTIONS PRESENTED 1

STATEMENT 2

A. AN ARREST IS INVALID IN THE ABSENCE OF A WARRANT OR EXIGENT CIRCUMSTANCES. 3

ARGUMENT:

I. THE PRIVACY OF THE PERSON IS TO BE ACCORDED AT LEAST AS SACROSANCT A POSITION AS THE PRIVACY OF ONE'S EFFECTS OR DWELLING 3

II. THE APPLICATION OF THE FOURTH AMENDMENT WARRANT REQUIREMENTS TO AN ARREST IS HISTORICALLY, RATIONALLY AND PRACTICALLY MANDATED 5

III. AN ALTERNATIVE BASIS EXISTS FOR SUSTAINING THE DECISION OF THE COURT BELOW 13

B. THE CONSENT TO SEARCH OBTAINED DURING THE COURSE OF ILLEGAL CUSTODY MAY NOT BE RELIED ON TO SUPPORT THE LATER SEARCH OF THE AUTOMOBILE 15

1. The Principles Of *Schneckloth v. Bustamante* Are Inapplicable To The Present Case 15

2. The Consent Obtained From Respondent Was Illegal Even Under The Principles Of *Schneckloth v. Bustamante, Supra* 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases:

Aguilar v. Texas, 378 U.S. 108 ..... 13, 15

Beck v. Ohio, 379 U.S. 89 (1964) 6

Bumper v. North Carolina, 391 U.S. 543 (1968) 17

Burrows v. Superior Court, 13 Cal.3d 238 (1974) 18

Carroll v. United States, 267 U.S. 137 (1925) 5

Chambers v. Maroney, 399 U.S. 42 (1970) 5

Chimel v. California, 395 U.S. 752 (1969) 20

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 6, 9, 15

Davis v. United States, 328 U.S. 582 (1946) 21

Gerstein v. Pugh, ____ U.S. ____, 95 S.Ct. 854, 862 (1975) 5, 6, 12

Giordenello v. United States, 357 U.S. 480 (1958) 4

Henry v. United States, 361 U.S. 98 (1959) 19

Katz v. United States, 389 U.S. 347 (1967) 4

Manning v. Jarnigan, 501 F.2d 408 (6th Cir. 1974) 19

People v. Haven, 59 Cal.2d 713 (1963) 18

People v. Lawler, 9 Cal.3d 156 (1973) 18

People v. Superior Court, 71 Cal.2d 265 (1969) 18

Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964) 15

Roaden v. Kentucky, 93 S.Ct. 2796 (1973) 5

Schneckloth v. Bustamante, 412 U.S. 218 (1973) .... *passim*

Spinelli v. United States, 393 U.S. 410 ..... 13, 14, 15

United States v. Kandlis, 432 F.2d 132 (9th Cir. 1970) 19

United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) 19

Page

United States v. Rabinowitz, 339 U.S. 56 (1950) 20

United States v. Rothman, 492 F.2d 1260, 1265 (1973) 18

United States v. Ventresca, 380 U.S. 102, 106 ..... 7, 18

United States v. Watson, 504 F.2d 849 (1974) 1

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Watson*, 504 F.2d 849 (1974).

QUESTIONS PRESENTED

1. Whether an arrest is invalid when conducted without exigent circumstances, and without warrant, six days after probable cause to arrest is obtained.

2. Whether a consent to search is invalid when obtained during the term of an unlawful custody and as a result of an illegal arrest.

STATEMENT

The following factual material is submitted as a supplement to the statement contained in the Brief for Petitioner.

The United States postal inspector, FRANK BARBARICK, had contact with the informant AWAD KHOURY, four or five times in 1972 regarding alleged mail fraud cases concerning Mr. WATSON. Appendix page 26. Khoury never testified in Court with regard to any of the information he gave to the inspector, nor had the information led to any arrests prior to the arrest of respondent on August 23, 1972, nor to any convictions. No corroboration was obtained with regard to KHOURY's information regarding WATSON, and no arrest of the respondent was made as a result of these early meetings. On August 17, 1972, KHOURY told BARBARICK that he (KHOURY) was about to obtain a credit card from HENRY WATSON later that day. Appendix, page 11-12. BARBARICK obtained the credit card and KHOURY indicated he could obtain more cards from respondent. At the agent's insistence, KHOURY arranged a meeting, which was postponed several times, but which eventually transpired on August 23, 1972. BARBARICK had arranged with KHOURY for a signal to indicate if WATSON was in possession of any stolen mail. The signal was given. BARBARICK then entered the restaurant in which KHOURY and respondent were meeting, and placed respondent under arrest.

WATSON was placed under arrest for the card obtained by BARBARICK on August 17, 1972, and not based upon the signal received by the surveilling agent on August 23, 1972. Appendix, page 23-24.

Respondent was then removed from the restaurant and given his *Miranda* warnings. BARBARICK asked if he could search respondent's car, to which respondent allegedly answered, "go ahead." BARBARICK conducted a search of the automobile and discovered an envelope on the driver's side under the floormat. The envelope was not opened until BARBARICK returned to his office in downtown Los Angeles. Appendix, page 90. Two envelopes were contained inside the outside envelope, and it was these two envelopes which contained the credit cards which were the source of the allegations in Counts 1 and 3.

A. AN ARREST IS INVALID IN THE ABSENCE OF A WARRANT OR EXIGENT CIRCUMSTANCES.

ARGUMENT

I.

THE PRIVACY OF THE PERSON IS TO BE ACCORDED AT LEAST AS SACROSANCT A POSITION AS THE PRIVACY OF ONE'S EFFECTS OR DWELLING.

The Fourth Amendment to the United States Constitution provides specific protection for the privacy of the "person" as well as "houses, papers and effects." Rationally, unless the notions of privacy ensconced in

that Amendment are to become enmeshed in a procedural morass, the protection of the person should be accorded the greatest protection. The notion that the places and things protected under the Fourth Amendment receive that protection only as a logical extension of protection to the person was underscored in *Katz v. United States*, 389 U.S. 347 (1967). The enormous body of litigation which has arisen under the search and seizure provisions of the Fourth Amendment on occasion results in a loss of perspective with regard to the basic protection of that provision. This Court has, from time to time, found it necessary to remind law enforcement, the legal profession and scholars alike that the ultimate privacy to be protected is the person and that the constitutional guidelines established under the Amendment apply with equal, if not greater, force there. *Katz v. United States, supra; Giordenello v. United States*, 357 U.S. 480 (1958).

As a result, while the accident of the course of litigation has resulted in an analysis of the Fourth Amendment protections primarily in a search and seizure situation, the application of these principles to the seizure of the person is by no means foreign or novel to Fourth Amenement analysis but, in fact, plays perhaps the most essential part in the application of the salutory provisions.

II.

THE APPLICATION OF THE FOURTH AMENDMENT WARRANT REQUIREMENTS TO AN ARREST IS HISTORICALLY, RATIONALLY AND PRACTICALLY MANDATED.

The balance of reasonableness which is to be struck in the Fourth Amendment analysis has been described as an "accommodation between the individual's right to liberty and the state's duty to control crime." *Gerstein v. Pugh*, ____ U.S. ____, 95 S.Ct. 854, 862 (1975). This in turn evolved to an analysis of the legitimate interests and pressures of law enforcement vs. the privacy interest which an individual may legitimately claim in the particular area sought to be intruded upon. Recognition of the sanctity of the home has led to a strict application of the warrant requirement in that area. The existence of a perhaps lesser interest in the privacy of a vehicle, when compared with the *possible* greater difficulties posed to law enforcement, results in a different balance being struck there. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 137 (1925). However, even in the latter circumstance, the availability of search upon probable cause alone is limited by the factual situation presented to the seizing authority. Thus, in *Roaden v. Kentucky*, 93 S.Ct. 2796 (1973), the Court required the demonstration prior to a search of an automobile upon probable cause of "exigent circumstances in which police action literally must be 'now or never.'" Similarly, the relative ease of obtaining a warrant and the lack of necessity for swift action without prior approval of a detached magistrate will also alter the

availability of search upon probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The applicability of these principles to an arrest clearly appears from this Court's recent pronouncements in *Gerstein v. Pugh, supra*. This Court has recognized there that the Fourth Amendment requires that the existence of probable cause "be decided by a neutral and detached magistrate whenever possible." Ibid. This Court in *Gerstein v. Pugh*, while recognizing that a preference for the use of an arrest warrant exists, *Beck v. Ohio*, 379 U.S. 89 (1964), expressed concern that an intolerable handicap for legitimate law enforcement would result through requiring a factual justification prior to "*any* arrest." Ibid. But see *Gerstein v. Pugh*, ____U. S. _____, 95 S.Ct. at 862, footnote 12. Inasmuch as the individual's interest in his personal privacy is at least as great as his interest in the privacy of his dwelling or effects, the ability to arrest upon probable cause without prior approval of the magistrate must arise from the necessity to protect the legitimate interests of law enforcement. A per se rule that a warrant is required in no arrest situation is as inappropriate as a per se rule with regard to searches. Thus, the facts of each case must control the necessity for prior judicial evaluation. As was stated in *Coolidge v. New Hampshire, supra*:

> "The case of *Warden v. Hayden*... where the court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stand by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." 403 U.S. 479-481.

When measured against these standards, it becomes apparent that the facts of the instant case are

insufficient to justify the actions of the federal authorities without prior judicial approval.

The unique facts of this case give rise to the absence of exigency or other legitimate law enforcement concern for prompt action. The postal inspector who effectuated the arrest testified without equivocation that the respondent was arrested based solely upon the credit card which had been provided six days prior. The testimony of the inspector further indicated that every opportunity existed to obtain such a warrant. Appendix page 29ff. The facts clearly indicate that the arresting agents had probable cause to arrest the respondent for the offense on which he was ultimately arrested six days prior to the arrest, but at no time attempted to obtain prior judicial approval for that arrest. No accommodation to legitimate law enforcement functions would be served through permitting such a delay. On the contrary, the position adopted by the Ninth Circuit will inure to the benefit of law enforcement. As indicated in the brief of petitioner, page 26, footnote 15, the propriety of an arrest will be more favorably assessed if the officer's belief regarding probable cause has been approved by a detached judicial officer. *United States v. Ventresca*, 380 U.S. 102, 106. Similarly, officers will be able to refrain from making improper arrests, once having been informed by a magistrate that the evidence in their possession is insufficient to substantiate probable cause. Petitioner's assertion in that same footnote that the interposition of a magistrate will protect a suspect only in "close cases" misses the point. For, an officer's determination as to the "closeness" or "obviousness" of probable cause lies at the heart of the requirement of the imposition of a detached judicial official.

Moreover, the use of a warrant in the present case would insure that the arrest was made while evidence was fresh and, to the extent that the officers feel the suspect will be involved in future criminality, prevents the commission of such crimes by effectuating an arrest of that suspect. The inconvenience to the officers, on the other hand, is minimal. No facts were produced to demonstrate that a warrant could not have easily been obtained during the six day period.

Petitioner has expounded a series of policies to support its conclusions with regard to the propriety of the Circuit Court's ruling. Brief for Petitioner, pages 22-26. In general, each of these policy considerations relies upon two assumptions made by petitioner which are incorrect. The first arises from petitioner's statement of the issue as whether a warrant for arrest is necessary for an arrest in a public place. The proper issue, however, is whether a warrant is required *prior to an arrest* when there exists no exigent circumstances for a warrantless arrest and there exists abundant time to obtain a warrant. The second of petitioner's misconceptions is that it interprets the opinion below as requiring the officers to obtain a warrant as soon as probable cause arises. That opinion, however, merely requires that police officers, in a situation not involving exigent circumstances, obtain an arrest warrant prior to the arrest of the suspect. In the instant case, therefore, if the officers were to base their arrest upon the card obtained on August 17, 1972, there being no exigent circumstances, a warrant was necessary.

Petitioner's first consideration in his brief at page 22, is that "a requirement that a warrant for arrest be obtained as soon as public officials have accumulated probable cause to arrest would put an unnecessary and

unfortunate premium upon haste . . . " Petitioner goes on to argue that even after probable cause to arrest arises, officers may attempt to obtain additional evidence. This argument fails in several respects. First, as indicated above, the question is not whether a warrant must be obtained "as soon as public officials have accumulated probable cause" but whether the warrant must be obtained prior to arrest.[1] Second, petitioner's argument assumes that the investigation must terminate upon the arrest of the suspect. This is clearly not the case. Third, and with special regard to the facts of the present case, the agents here did not conduct an investigation with regard to the August 17 credit card, but were attempting to incriminate the respondent with regard to new offenses.

Petitioner goes on to argue at page 23 of his brief that circumstances may exist in which officers, although armed with probable cause, may be investigating the wrong suspect and that a continued period of investigation might establish this person's innocence. Again, the decision of the Court of Appeal does not require an immediate arrest. Secondly, the balance with regard to innocence or guilt may be struck differently

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[1] The incorrectness of the petitioner's position is adequately underscored by the Circuit Court's reliance upon *Coolidge v. New Hampshire, supra*. The issue in that case was not whether the search was illegal as a result of delay in searching, but rather whether the search, in the absence of a warrant and exigent circumstances was illegal. The fact of delay is only relevant with regard to a determination as to whether exigency existed. In both *Coolidge* and the present case, respondent does not complain because the officers waited to arrest him, but, rather, that they had every opportunity to obtain a warrant during that term of delay and thus submit the issue of probable cause to a magistrate.

by an officer involved in the "competitive enterprise of ferreting out crime" than by a magistrate. As indicated previously, this Court has required the issue of probable cause to be submitted to a magistrate where practicable. The argument is also inapplicable to the present case, based upon the clear indication of the agent that the arrest was for the initial offense, and that there could therefore be no attempt to clear the respondent of this crime.

Petitioner next argues that a rule requiring a warrant "as soon as he has obtained probable cause" would expose officials to the horns of a dilemma. Petitioner argues that if the officers fail to realize probable cause exists, and rely upon other indicia of guilt, they risk suppression of their later discoveries. This is clearly incorrect. If the officers in the present case waited for other indicia of guilt, and if they had arrested upon such indicia of guilt, that arrest, if based upon exigent circumstances, would have been valid. In such a situation, the failure to arrest upon the initial offense would not have vitiated either the arrest or the later discoveries. Again, the issue is not the officers delayed in making the arrest, but rather that the absence of exigent circumstances and the opportunity to obtain a warrant required that it be obtained.

Petitioner asserts in footnote 13 at page 24 of his brief that KHOURY's signal itself furnished probable cause to arrest the respondent or strongly reinforced the preexisting cause. The agents testified, however, that they arrested the respondent only upon the August 17 credit card. They did not rely upon KHOURY's signal. There was no claim that exigency arose as a result of that signal. In short, the government failed to sustain its burden of proof with regard to the arrest with regard to exigency.

Petitioner next asserts at pages 24-25 of the brief for petitioner that the longer the officers postponed the arrest, the less useful a warrant would become as a shield against unjustified behavior. During this period of delay, petitioner argues, officers will have an opportunity for "reflection" and may supplant the initial grounds by other and "more persuasive grounds." Once again, the agents in the instant case were perfectly free to continue their investigation. If they had discovered evidence of another crime, they could have arrested upon that evidence. However, once they determined to make an arrest for the initial offense, in view of the ability to obtain a warrant, they were required to do so. The dilemma proposed by petitioner at footnote 14, page 25, brief for petitioner, is similarly dispelled. Petitioner there asserts that the officers would be "best off should the magistrate decline to issue a warrant when first approached." In petitioner's view, this would allow the officers to continue their investigation. The officers could then "arrange" to gather additional evidence and arrest on the spot "on the basis of this new evidence plus exigent circumstances." The dilemma, does not arise, simply because there is no requirement that the officers obtain the warrant immediately. Similarly, the officers, if they had demonstrated exigent circumstances, could have arrested respondent based upon probable cause plus exigent circumstances. However, they chose not to do so, but rather to rely upon the August 17 offense. Once again, the burden was upon the government to justify the

warrantless arrest and their failure to establish or rely upon exigency bars that consideration here.[2]

Petitioner's final argument is that a policeman's "on the scene" assessment of probable cause is sufficient, especially in view of this Court's determination in *Gerstein v. Pugh*, No. 73-477, decided February 18, 1975, that a probable cause determination is necessary promptly after arrest in order to justify continued detention. While this position has great vitality in a situation in which exigent circumstances exist, the warrant requirement of the Fourth Amendment as consistently interpreted by this Court requires that that determination be made by a magistrate where practicable. This Court determined in *Gerstein v. Pugh*, that even a slight detention raises serious issues of due process. Where there is adequate opportunity to obtain a warrant, the proper procedure is and should be to submit that determination to a magistrate prior to the arrest. Petitioner's previous concern at page 23 of the brief for petitioner for the possible arrest of innocent suspects is completely inconsistent with the position at pages 25-26 of the brief in failing to recognize the severe hardship and constitutional deprivation which is inherent in any detention or arrest.

In sum, the basic constitutional rationale expressed on numerous occasions by this Court with regard to the necessity for a detached magistrate's determination of probable cause, where practicable, applies most strongly in an arrest situation. There is no doubt that the agents

[2] As a result of the agent's failure to rely upon the events of August 23 with regard to the arrest of the respondent, this area was not explored below by respondent's counsel. Thus, very sound legal, practical and constitutional reasons may have existed for such non-reliance.

in the present case arrested as a result of the six day old offense. The government in this case would be hard put to claim a harmful effect upon law enforcement through the utilization of the warrant procedure inasmuch as the inspectors themselves apparently felt that the six day lapse would have no harmful effects upon their case or society. The benefit to the individual is apparent and was recognized through the adoption of the Fourth Amendment to the United States Constitution.

III.

AN ALTERNATIVE BASIS EXISTS FOR SUSTAINING THE DECISION OF THE COURT BELOW.

Aside from the issues raised in the petition for writ of certiorari, it appears that the information relied upon by the postal inspector in order to arrest the respondent was constitutionally inadequate. Under the standards announced in *Aguilar v. Texas*, 378 U.S. 108 and *Spinelli v. United States*, 393 U.S. 410, a determination of sufficiency of information to support probable cause which relies upon information, must present sufficient facts to establish the reliability or credibility of that informant. The present situation is somewhat unique in that the only information relative to criminal conduct comes through the mouth of the informant. Thus, it is absolutely essential, in order to substantiate the arrest and subsequent search involved, that this informant meet the *Aguilar-Spinelli* standards.

Inspector BARBARICK testified that he spoke with KHOURY in 1972 and that on each of these occasions

the conversations involved Mr. WATSON. KHOURY admittedly had been arrested for mail violations himself. At the time of his arrest, which was the first meeting with BARBARICK, KHOURY stated that he had obtained the necessary documents to allow him to engage in mail fraud for Mr. WATSON. However, no corroboration was done by BARBARICK with regard to this aspect of KHOURY's information, and no arrest of the respondent was made for that crime. Appendix pages 30-31. The other information which BARBARICK received from KHOURY dealt with associates of the respondent. However, KHOURY was never surveilled by the agents to ascertain if he actually did come in contact with these "associates." No arrests were made based upon this information, and KHOURY never testified with regard to any of this information. No arrests or convictions had arisen out of any of KHOURY's information. The only corroboration which was indulged in by the agents was apparently to ascertain that, to their knowledge, the people mentioned by KHOURY were in fact somehow associated with WATSON. No corroboration was made with regard to any facts which were at all criminal in nature. Corroboration with regard to criminality, however, is absolutely essential under the dictates of *Spinelli v. United States, supra*. It is difficult to imagine, therefore, that the information given at the suppression hearing could establish the reliability of Mr. KHOURY or his present credibility.

Furthermore, there was no corroboration made with regard to the information given by KHOURY concerning the present incident with the respondent. BARBARICK took at face value all of the allegations made by KHOURY, including that respondent had

given KHOURY the list of airports and the credit card upon which the arrest was based. In contrast, although a series of meetings were allegedly arranged between KHOURY and respondent, two or three of them did not actually take place. BARBARICK never overheard any conversations between KHOURY and respondent. It is inconceivable that these facts can meet the bare minimum standards of the test enunciated by *Aguilar v. Texas, supra,* and *Spinelli v. United States, supra.*[3] The arrest of the respondent was therefore constitutionally impermissible.

B. THE CONSENT TO SEARCH OBTAINED DURING THE COURSE OF ILLEGAL CUSTODY MAY NOT BE RELIED UPON TO SUPPORT THE LATER SEARCH OF THE AUTOMOBILE.

1. The principles of *Schneckloth v. Bustamante,*[4] are inapplicable to the present case.

Petitioner has placed great reliance upon this Court's opinion in *Schneckloth v. Bustamante, supra*. Brief for

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[3]It should be noted that an alternative ground, authorizing suppression of the evidence presented to the Court of Appeals, but not discussed in the opinion, is that the seizure of the envelope with its unknown contents was itself impermissible and could not be justified under any recognized constitutional doctrine. The validity of a "plain view seizure" requires that it be "immediately apparent to the police, that they have evidence before them." *Coolidge v. New Hampshire, supra*. The later search of the envelope also violates the precepts of *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881 (1964).

[4]412 U.S. 218 (1973).

Petitioner, pages 27-39. Two crucial distinctions, however, exist between the instant case and the factual situation considered in *Schneckloth*. The first is that the respondent here was in custody at the time of the elicitation of the purported consent. The second factor is that the custody situation was itself illegal and in violation of the Constitution. (See preceding argument.) Each of these considerations is important to an analysis of the legitimacy of the consent and is determinative of the issue.

This Court in *Schneckloth* was careful to limit the scope of its holding. The opinion concluded at 412 U.S. 249-250 with the *caveat*:

> "Our decision today is a narrow one. We hold only that when the subject of a search is *not in custody* and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (Emphasis added)

The importance of the custodial nature of the interrogation was clearly recognized by this Court. Thus, custodial interrogation was termed "inherently coercive." 412 U.S. at 240. See also 412 U.S. at 232. The importance of this difference was outlined at 412 U.S. 228:

> "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

Thus, contrary to the petitioner's contention, the Court's opinion in *Schneckloth* in fact recognized the coercive nature of custodial interrogation and, it is submitted, that this distinction alone would give rise to a difference in result. Furthermore, it is apparent that the Fifth Amendment guarantee against self-incrimination is especially critical in a custody situation. To a lay suspect, however, silence, in the face of a request for consent, may be considered tantamount to an admission. Recognition of this natural tendency to assume guilt based upon silence or assertion of constitutional right was made in *Griffin v. California,* _____ and the discussion there is equally applicable to the present situation. Consequently, exclusion of consent obtained through custodial request is constitutionally compelled. Furthermore, unlike *Schneckloth v. Bustamante, supra*, this Court is in the present case free to exercise its supervisory powers over the activities of the federal judiciary and authorities involved.

The second very crucial difference between the present case and *Schneckloth* is in the illegal nature of the custody. Petitioner's contention, as stated at pages 37ff of the brief for petitioner, is that lack of knowledge on the part of the suspect of the illegality of the arrest vitiates any proper consideration of that illegality with regard to the later consent. However, it is apparent that this Court has been very careful to avoid utilization of illegal police procedure to obtain evidence or testimony against a criminal defendant. The Court has explicitly recognized coercion to be implicit in any submission to a *claim* of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543 (1968). In the present case, the exploitation of the illegal arrest is tantamount

to the assertion of lawful authority found coercive in *Bumper*. In each case, the assertion of the right to initiate the questioning was based upon a non-existent authority. This Court has emphasized that the actions of police officers are to be judged in a common sense and non-technical manner. *United States v. Ventresca, supra*. No less a standard should be applied to the actions of a recently arrested suspect. It would be unreasonable and hyper-technical to expect a criminal defendant to stand mute in the face of an official and apparently legal request to conduct a search. In such a situation, the consent is inextricably bound to the prior illegal activity. Interestingly, the Court's opinion in *Schneckloth v. Bustamante, supra*, followed almost precisely the holding of the California Supreme Court on direct appeal. The California courts had long held that the voluntariness of the consent was to be judged upon the totality of the circumstances. The California courts, however, have also held that consent obtained during the course of an illegal detention or search is too closely associated with that illegal activity to be valid. *Burrows v. Superior Court*, 13 Cal.3d 238 (1974); *People v. Lawler*, 9 Cal.3d 156 (1973); *People v. Superior Court*, 71 Cal.2d 265 (1969); *People v. Haven*, 59 Cal.2d 713 (1963). The Ninth Circuit has also previously come to a similar conclusion in *United States v. Rothman*, 492 F.2d 1260, 1265 (1973), where it was noted:

> "This is not a case in which a consent search was necessary or proper. If probable cause for a search was available the officers had ample time to get a warrant. (Citation omitted.) There was no risk that evidence would be lost or destroyed or that Rothman would flee. In short, there was no justification for the coercive official tactics which produced this consent."

Similarly, in *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974), the Court considered an automobile stop conducted without probable cause. During the term of the detention, consent to search was obtained and the Court determined that the items seized pursuant to the consent, as the fruit of the unlawful detention, should have been suppressed. See also *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); and *United States v. Kandlis*, 432 F.2d 132 (9th Cir. 1970).

The necessity for such a prophylactic action results not only from a need to prevent judicial involvement in illegal police activity, but to discourage such activity in the first instance. Petitioner in its brief, has underscored the wide use of consent throughout federal and state jurisdictions. This Court has also recognized the widespread use of this search tactic. *Schneckloth v. Bustamante, supra*. Thus, it is highly probable that officers may be encouraged to conduct an illegal arrest in the hopes of obtaining a valid consent to search thereafter. In such a way, investigative agencies, realizing the subtle coercive effects of custodial requests to search, may initiate such arrests upon suspicion or whim, realizing that the worst that can happen is that the suspect would refuse to consent. On the other hand, if the suspect falls prey to the pressures of custody and does "consent" contraband or evidence, although completely unknown to the officers prior to the search, could be uncovered. Persons innocently going about their business could therefore be subject to detention or arrest without any sufficient basis solely upon the suspicion or belief of police authorities.

In this case, it is clear that the agents, armed with probable cause to arrest the respondent, waited over a

period of several days until they felt the respondent might be in a position in which they could, through one means or another, initiate a search of the respondent's person and automobile in order to discover additional items of evidence or contraband. The possibility for abuse is highlighted not only by the fact that the agents arrested the respondent based *only* upon the information which they had possessed for six days and not upon the information they obtained on the day of arrest; but that the agent did not even bother to verify his opinion of the nature of the contents of the discovered envelope until returning to his office hours later. It thus appears that the factual circumstances of this case directly parallel the concern which this Court expressed in *Chimel v. California*, 395 U.S. 752 (1969). The pre-*Chimel* search incident to arrest rule, enshrined in *United States v. Rabinowitz*, 339 U.S. 56 (1950), presumably permitted officers, armed with probable cause, to arrest a suspect and utilize that arrest as a subterfuge to authorize a wholesale search of the suspect's dwelling. The prophylactic measures announced in *Chimel* are equally applicable to the arrest situation and the determination that the "consent" in the present case is illegal is consistent with these principles.

2. The Consent obtained from respondent was illegal even under the principles of *Schneckloth v. Bustamante, supra.*

As indicated previously, petitioner relies almost exclusively upon this Court's decision in *Schneckloth v. Bustamante, supra*, with regard to the issue of the

voluntariness of the consent. The tenor of the petitioner's argument is that the only considerations relevant to the voluntariness determination under *Schneckloth* are those relating to the subjective impressions of the respondent. A fair reading of *Schneckloth*, however, supports no such limitation. This Court has stated that the proper focus is on the "totality of the circumstances." Such "totality" would appear to include more than the limited inquiry into the subjective state of the respondent. *Schneckloth* cites as support for its conclusion *Davis v. United States*, 328 U.S. 582 (1946). Two of the factors relied upon there with regard to the voluntariness determination were "the public character of the property" and the "existence of the right to inspect." These inquiries have no relevance with regard to the subjective state of the alleged consentor, but, rather, bear upon the legality and appropriateness of the police conduct. This Court in *Schneckloth* went on to note:

> "Two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." 412 U.S. at 227.

The language chosen by the Court with regard to "legitimate need" reflects the analysis made by this Court in the preceding paragraph of the *Schneckloth* opinion in which it was stressed that the standards announced were a balance between a protection of the security of the citizenry and the necessity for effective and proper law enforcement. Thus, the *Schneckloth* determination would seem to include in each case an analysis of whether the consent as obtained served this

legitimate police function. It thus becomes apparent that considerations as to the legality of the arrest and detention of respondent are competely relevant in determining the "voluntariness" of the consent. For, exploitation of illegal procedure does not serve the legitimate ends of effective law enforcement. The interpretation sought by petitioner would have the deleterious effect of encouraging to some degree an illegal detention or arrest in the hopes of obtaining a consent. However, there should be no right for an investigative agency to benefit from a situation which it had no right to create in the first instance.

This case thus presents a situation in which consent was obtained during an illegal arrest and without advisement of the right to refuse such authority. These factors, together with the ability of this Court to exercise its supervisory powers over the federal judiciary and law enforcement agencies mandates that the consent from the respondent be determined to be invalid.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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